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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/751,535	01/06/2004	Van Miller	1358-01	3319
58388 7590 07/16/2007 GOWAN INTELLECTUAL PROPERTY 1075 NORTH SERVICE ROAD WEST SUITE 203 OAKVILLE, ON L6M-2G2 CANADA			EXAMINER TRAN LIEN, THUY	
			ART UNIT 1761	PAPER NUMBER
			MAIL DATE 07/16/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

**Application No.**

10/751,535

**Applicant(s)**

MILLER, VAN

**Examiner**

Lien T. Tran

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 May 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-9 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

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Claims 1-9 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In the amendment filed on 1/8/07, applicant amends claim 1 to include the limitation of " an un-fractionated by product"; this limitation does not have support in the original disclosure. The specification does not disclose that the baking ingredient is an un fractionated by-product.

Claims 1-4, 7-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chaudhary.

Chaudhary discloses a high dietary fiber product. The product is produced by drying brewer's spent grain. The high dietary fiber product comprises 70% fiber, 5.8% crude fat and about 20% protein. The product is used to prepared extruded food product such as raisin bran and is used in amount of 25%. The product is also used in baked products such as bread in amount of 15%. ( see col. 1 lines 50-59, col. 2 lines 21-31 and col. 3 lines 3-10, and table 1)

Chaudhary does not disclose the source of grain from which the spent grain is made, the addition of water, the pH as claimed and the product as cited in claims 8-9.

It would have been obvious to choose the spent grain from any known source and all the cereal grains claimed are well known in the art. As to the additional components, the product of Chaudhary is obtained from spent grain which is the same

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source of material as claimed; thus, it is obvious the components are the same. If the components are not the same, it would have been obvious to one skilled in the art to fractionate the spent grain to obtain fractions having any selected additional components such as minerals, amino acid and lysine depending on the nutritional status desired. This would have been within the determination of one in the art. The product of Chaudhary is added to baked product; thus, it would have been obvious to add water to the product to hydrate it thereby facilitating its addition to the baked product. The amount of water added depends on the product made and the amount of fiber product added; this can be determined by one skilled in the art through routine experimentation. Since the product is obtained from the same source as claimed, it is obvious the initial pH is the same as claimed because the specification does not disclose adding anything to alter the pH. Chaudhary discloses using the fiber product in baked products; thus, it would have been obvious to add the fiber to any baked product including cookie, muffin, waffle and nutribar when wanting to make baked products having a high fiber content. Since the fiber product is from the same source as claimed, it is obvious it possesses the property of having reduced glycemic index. As to the product being un-fractionated, this is a difference in the way the additive is obtained which does not determine the patentability of the product.

Claims 5-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chaudhary in view of Rasco et al.

Chaudhary does not disclose the pH of the additive which is adjusted using sodium bicarbonate.

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Rasco et al disclose product produced from dried distillers' spent cereal grains. They teach to adjust the pH of the product to neutral in the pH range of 5-8 so that the product is not sour or acidic ( see col. 2 lines 39-43, col. 4 lines 25-26)

It is obvious that the additive of Chaudhary has the initial acidic pH as claimed because it is the same additive as claimed. As shown by Rasco et al, acidic pH will give the product a sour taste or acidic taste which makes the product organoleptically unacceptable. Thus, it would have been obvious to neutralize the pH to make a more appealing product. It would have been obvious to use any source of alkali and sodium bicarbonate is a well-known alkali to use in food product; thus, such usage would have been obvious to one skilled in the art.

In the response filed 5/3/07, applicant states that the description teaches the entire spent grain material is to be used. The examiner respectfully disagrees with this statement. The specification does not disclose the entire spent grain is used. The specification only discloses spent grain; there is nothing about the grain being unfractionated or fractionated for that matter. The only disclosure is of spent grain. On page 9, it is disclosed " if the baking ingredient is to be employed as a low moisture baking additive, it will comprise from 50-70% fiber, and if the baking ingredient is to be employed is a high moisture baking additive, then typically it will comprise from 20-25% fiber". This disclosure suggests that different fractions are used because the amounts of fiber are different. If the same whole spent grain is used, what makes the amount of fiber to be different in the two baking ingredients. Contrary to applicant's statement, the

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examiner cannot find support anywhere for terms such as “ whole, entire, complete and un-fractionated”.

With respect to the 103 rejection, applicant argues the Chaudhary material is not an un-fractionated by product from the brewing of distilling industries. This argument is not persuasive. The difference between fractionated and un-fractionated with respect to the claimed composition is in name only. The claims recite a baking ingredient obtained from brewing or distilling industries comprising 20-30% protein, 50-80% fiber, up to 15% fat and up to 2% additional components. Chaudhary discloses such ingredient; the amount of additional components is inherent because the fraction is obtained from spent grains having the amounts of fiber, protein and fat falling within the claimed ranges. Applicant's composition includes high fiber fraction because it is disclosed in Chaudhary that whole spent grain contains 29.9% protein. The claimed composition includes protein of 20% which is more consistent with the high fiber fraction. Thus, the issue of fractionation and unfractionation does not define the claims. It is the amounts of the protein, fiber and fat that define the composition and Chaudhary discloses such amounts. Applicant further argues the Chaudhary process eliminates 43% of the spent grain material. The claims are direct to a product; how the product is made is not an issue to be considered. Applicant argues the glycemic index of fractionated material may and probably will change. The argument is not supported by factual evidence. Further, if the composition contains the same amount of fiber and protein as claimed, it is inherent the glycemic index is reduced as claimed and the initial pH is the same as claimed.

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Applicant's arguments filed 5/3/07 have been fully considered but they are not persuasive.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

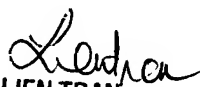
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Hendricks Keith can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

July 9, 2007

  
LIEN TRAN  
PRIMARY EXAMINER  
